86-106 (3)

Supreme Court, U.S.
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No. A-964

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

WILLIAM HAROLD KELLEY,
Petitioner,

-vs-

THE STATE OF FLORIDA,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

ROBERT J. KRAUSS
ASSISTANT ATTORNEY GENERAL

ROBERT J. LANDRY
ASSISTANT ATTORNEY GENERAL
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

7/PP

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Florida Supreme Court applied a constitutionally impermissible standard in assessing whether the State's destruction of all of the real evidence in the case deprived petitioner of a fair trial.

II. Whether the admission of third party testimony offered by the State to rebut an express or implied charge of recent fabrication or improper motive violated petitioner's constitutional rights to due process and confrontation.

III. Whether in this case the death penalty constitutes cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW vii

JURISDICTION OF THE COURT vii

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED viii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 8

POINT I: 8

THE FLORIDA SUPREME COURT APPLIED A CONSTITUTIONALLY PERMISSIBLE STANDARD, IN ACCORD WITH PRIOR RULINGS OF THIS HONORABLE COURT, IN ASSESSING WHETHER THE STATE'S DESTRUCTION OF REAL EVIDENCE DEPRIVED PETITIONER OF A FAIR TRIAL.

POINT II: 18

THE ADMISSION OF THIRD PARTY TESTIMONY TO REBUT AN EXPRESS OR IMPLIED CHARGE OF RECENT

FABRICATION OR IMPROPER MOTIVE DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND CONFRONTATION.

POINT III: 22
THE DEATH PENALTY RECEIVED BY PETITIONER WAS IMPOSED IN ACCORDANCE WITH CONSTITUTIONALLY PERMISSIBLE STANDARDS.

CONCLUSION 28

CERTIFICATE OF SERVICE 29

APPENDIX A-1

Opinion of the Supreme Court of Florida (April 10, 1986). . .

TABLE OF AUTHORITIES

PAGE NO.

Agan v. State, ... 26
445 So.2d 326 (Fla. 1983)

Booker v. Wainwright, ...24
764 F.2d 1371 (11th Cir. 1985),
cert. denied, 106 S.Ct. 339 (1985)

Brady v. Maryland, ... 11
373 U.S. 83 (1963)

California v. Trombetta, ... 11
467 U.S. 479 (1984)

Cardinale v. Louisiana, ...10
394 U.S. 437 (1969)

Godfrey v. Georgia, ...26
446 U.S. 420 (1980)

Hitchcock v. Wainwright, ... 23
No. 85-6756, cert. granted,
54 U.S.L.W. 3809 (S.Ct. June 9, 1986)

Proffitt v. Wainwright, ...26
428 U.S. 242 (1976)

Salvatore v. State, ... 9
366 So.2d 745 (Fla. 1978)
cert. denied, 444 U.S. 885 (1979)

Squires v. State, ...26
450 So.2d 208 (Fla. 1984)

TABLE OF AUTHORITIES

PAGE NO.

State v. Sobel, ... 9
363 So.2d 324 (Fla. 1978)

Sullivan v. Wainwright, ...24
464 U.S. 109 (1983)

United States v. Agurs, ...11
427 U.S. 97 (1976)

United States v. DeVore, ... 20
423 F.2d 1069 (4th Cir. 1970)
cert. denied, 402 U.S. 950 (1971)

OPINIONS BELOW

The opinion of the Supreme Court of Florida in Kelley v. State is reported at 486 So.2d 578 (Fla. 1986). It is reproduced in the Appendix at A-1, et seq.

JURISDICTION OF THE COURT

To the extent that a substantial federal question may be presented, jurisdiction is properly invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT XIV

Section I. . . .No State shall make or enforce any law which shlal abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . .to be confronted with the witnesses against him. . .

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

6C FLA. STAT. ANN. §90.801 (WEST 1979)

90.801. Hearsay; definitions; exceptions (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is: (b) Consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication.

23 FLA. STAT. ANN. §921.141 (WEST 1985)

921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) Separate proceedings on issue of penalty -- Upon conviction or adjudication of guilty of a defendant of a capital felony, the court shlal conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shlal be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilty of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay

statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death -- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of Judgment and Sentence -- The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Flroida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances -- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

STATEMENT OF THE CASE

On October 3, 1966, Charles Von Maxcy was murdered in his home in Sebring, Florida, by petitioner. Maxcy had been stabbed several times and shot in the head.

John J. Sweet was tried twice for that murder, it being the State's contention that Sweet had helped arrange for the murder of Maxcy so that Maxcy's widow, Irene, could inherit Maxcy's considerable wealth. Sweet had been involved in a love affair with Irene Maxcy. Sweet's first trial ended in mistrial where the jury was unable to reach a verdict, and the second trial resulted in the conviction which was overturned on appeal.[1/] At both trials,

1/ Sweet v. State, 235 So.2d 40 (Fla. 2d DCA), cert. denied, 239 So.2d 267 (Fla. 1970).

the State alleged that Sweet had planned the murder but had "hired" William Kelley and Andrew Von Etter to do the actual killing. Upon remand from the appellate court, the State indicated that inability to obtain necessary witnesses made it impossible to try the case again and Sweet's motion for discharge was granted. Thus, although petitioner Kelley was considered a suspect in the murder since the late 1960's, the evidence was insufficient to bring an indictment.

In April, 1976, some nine and one half years after Maxcy's murder, the Clerk of the Tenth Judicial Circuit of Florida in and for Highlands County requested the State Attorney for Highlands County to file a petition for disposal of the evidence being stored for use in the case against Sweet. The Clerk advised that he

needed the storage space and requested disposal of the following evidentiary items: a tire, a white bed sheet, a section of shirt, a bullet and/or slug, and two hand written statements of Sweet (R.1206-1208). The petition for disposal was granted by the Circuit Court on April 30, 1976.

At petitioner Kelley's trial, Sweet testified that after his Florida trials he began selling marijuana for petitioner in Massachusetts (R.668). During this time, Sweet became afraid of petitioner (R.666). At some point, an Arthur Raoul stole some of the marijuana and petitioner thought Sweet had stolen it (R.669). Petitioner severely beat up Sweet and would have killed him but for a companion stopping petitioner by stating, "Bill, no killings tonight. Everyone knows you are here."

(R.669) Petitioner then called Sweet and told him to bring a pistol because, "we are going to Providence, Rhode Island, for Arthur Raoul." (R.667) At that point, Sweet panicked and called his son-in-law, a police officer, who contacted the Massachusetts State Police on Sweet's behalf (R.667). Sweet gave the Massachusetts State Police information about numerous Massachusetts crimes as well as information concerning the Maxcy murder (R.606-607). Although Sweet never asked for immunity (R.614), he was given immunity for numerous Massachusetts offenses as well as for the Maxcy murder and the perjury committed by Sweet in his two Florida trials (R.606,608,614-632). Only as a result of Sweet agreeing to testify was the State able to bring an indictment against petitioner Kelley.

Sweet further testified at petitioner's trial on direct exam that at Irene Maxcy's insistence he made arrangements to have Charles Von Maxcy killed; that the arrangements were made through Walter Bennett of Boston; that petitioner and Von Etter came to Sebring and met with him; and that h drove petitioner and Von Etter to the Maxcy house where they committed the murder (R.579-594). Defense counsel's cross-examination of Sweet raised an express or implied charge of recent fabrication or improper motive (R.611-676), and petitioner has never contended otherwise.

To rehabilitate Sweet, the State presented the testimony of Abe Namia (R.765-772), who testified that before Sweet's first trial Sweet told him that Irene Maxcy asked Sweet if anyone in the Boston area would be interested in doing

some work in Florida; that Sweet related this to Wimpy Bennett; that from that time forward Irene and Bennett talked directly to each other; that unknown assasins came to Florida twice to kill Maxcy but aborted their plans; that eventually petitioner and Von Etter came to Sebring and met with Sweet; and that Sweet drove them to the Maxcy house (R.770-772).

Subsequent to the rendition by the jury of a guilty verdict, the penalty phase commenced. The jury returned, by a vote of 8-3, an advisory sentence recommending that the death penalty be imposed on petitioner. The trial court found three statutory aggravating circumstances, to wit: (1) prior conviction of a violent felony; (2) the homicide was committed for pecuniary gain; and (3) the homicide was committed in a cold, calculated and premeditated manner

without any pretense of moral or legal justification. As a nonstatutory mitigating circumstance the trial court found that the defendant was the only participant in the Maxcy murder to receive punishment.[2/] The trial court imposed a sentence of death upon petitioner.

2/ Irene Maxcy was given immunity to testify at Sweet's trials in Florida; as stated above, Sweet's conviction was reversed and remanded and the State was unable to proceed; Andrew Von Etter was found murdered subsequent to the Maxcy murder.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

THE FLORIDA SUPREME COURT APPLIED A CONSTITUTIONALLY PERMISSIBLE STANDARD, IN ACCORD WITH PRIOR RULINGS OF THIS HONORABLE COURT, IN ASSESSING WHETHER THE STATE'S DESTRUCTION OF REAL EVIDENCE DEPRIVED PETITIONER OF A FAIR TRIAL.

Petitioner seeks to have this Honorable Court grant certiorari on the ground that the Florida Supreme Court purportedly applied a constitutionally impermissible standard in determining whether the State's destruction of real evidence in a capital case deprived the petitioner of a fair trial. Respondent asserts that this claim is not worthy of certiorari review by this Honorable Court for the reasons expressed below.

The gravaman of petitioner's claim is

that the Florida Supreme Court focused upon the character of the State's conduct in destroying real evidence rather than upon the materiality of the evidence, and hence the prejudice to the defendant. Petitioner contends that the Florida Supreme Court's "variable analysis test" is unconstitutionally stringent by requiring a defendant to show greater prejudice where the government has not acted in bad faith. It is significant to note, however, that this claim was never presented to the Florida Supreme Court. Rather, in his briefs and in oral argument before the Florida Supreme Court, petitioner argued that application of the variable standard analysis established by the Florida Supreme Court in State v. Sobel, 363 So.2d 324 (Fla. 1978), and Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert. denied, 444 U.S. 885 (1979),

to the facts of the instant case required a conclusion that petitioner was denied his right to a fair trial due to the State's destruction of evidence. Thus, petitioner's newly-articulated contention that the Florida Supreme Court applies an unconstitutionally stringent test was never asserted by petitioner nor passed upon by the Florida Supreme Court. It is apparent that petitioner is changing the basis of his claim in his petition for writ of certiorari where this newly-articulated ground was not raised in the state court. Cf. Cardinale v. Louisiana, 394 U.S. 437 (1969). Your respondent asserts that a theory not asserted before a state court is not cognizable before this Honorable Court.

In addition to the non-assertion by petitioner of the theory now advanced before this court it is apparent that the

Florida Supreme Court's decision is consistent with this Honorable Court's decisions in Brady v. Maryland, 373 U.S. 83 (1963), United States v. Agurs, 427 U.S. 97 (1976), and California v. Trombetta, 467 U.S. 479 (1984). Of course, Brady and Agurs are "suppression" cases whereas Trombetta is a decision of this Honorable Court pertaining to evidence which has not been "preserved" by the State. It is significant to note that in Trombetta, this Honorable Court placed emphasis upon the "good faith" of the State authorities where this Court noted that the authorities did not destroy breath samples in a calculated effort to circumvent the due process requirement of Brady. In the instant case, the Florida Supreme Court made a specific finding that there was not even a hint of bad faith by the Florida prosecuting authorities. In

distinguishing Brady and Agurs, the Florida Supreme Court noted that, "In none of those cases was the lost or destroyed evidence completely unlinked to any active, or even forseeable prosecution." The unusual facts of the instant case as related above in the Statement of the Case supply ample justification for this Honorable Court to decline to exercise its certiorari jurisdiction.

Additionally, petitioner has never established that the excluded evidence was "constitutionally material". If there is a duty imposed by the United States Constitution on the states to preserve evidence, that duty is limited to evidence which possesses an exculpatory value that was apparent before the evidence was destroyed, and the evidence must be of such a nature that the defendant would be unable to obtain comparable evidence by

other reasonably available means. This test of materiality as enunciated in Trombetta is similar to the test of materiality announced in Agurs, supra. In accordance with Agurs, the Florida Supreme Court recognized that the trial court in the instant case "specifically found that the destruction of the particular evidence here in question did not prejudice appellant's case, or create an otherwise non-existent reasonable doubt." Therefore, by recognizing that the governmental officials acted in good faith and by further recognizing that no prejudice ensued to petitioner, the Florida Supreme Court has applied the proper standard in assessing the destruction of evidence claim.

The record of the instant cause which was reviewed by the Florida Supreme Court reveals that petitioner's claim of

destruction of evidence was properly adjudicated by the Florida state courts. The exhibits which were destroyed were only the State exhibits from the Sweet trials. The defense exhibits were still available at the Clerk's office. Approximately 90 percent of the evidence which was destroyed was documentary evidence, copies of which were available for use by the defense. There was never a showing by petitioner that the test results obtained for the Sweet trials could not be used by petitioner's defense team - the lab reports pertaining to the sheet and other items of other physical evidence were available (R.69-70, 76).

In his petition for writ of certiorari, petitioner focuses upon the bed sheet which was found outside the bedroom where Maxcy's body had been found. At trial, it was petitioner's theory that

he could not have been responsible for Maxcy's death inasmuch as he was seen shortly after the homicide with no blood on his clothes. Testimony at trial indicated that there was considerable blood in the bedroom and hallway indicating that a struggle had occurred. To rebut this theory, the State contended that the sheet was wrapped around the victim before he was stabbed to absorb the blood. Applying the test of constitutional materiality as enunciated in Trombetta, it is apparent that petitioner could not demonstrate prejudice. Petitioner's claim that the bed sheet had an exculpatory value is tenuous and any exculpatory value would not have been apparent before the items were destroyed. More importantly, the defense team was able to obtain comparable evidence to support its "blood on the

killers" theory where, as aforestated, there was testimony revealing that considerable blood was found in the bedroom and hallway. Further, the medical examiner testified that the victim had been able to struggle for minutes after being stabbed, that his heart would have continued to pump blood during a struggle, and that Maxcy's body had skin abraisions on it. Combined with the fact that the lab reports pertaining to the sheets were available for use by the defense, it is apparent that comparable evidence was available to support the defense theory. With respect to all the evidence from the Sweet trial which was destroyed by the State, petitioner has never demonstrated that those exhibits possessed an exculpatory value that was apparent before the evidence was destroyed and was of such a nature that the defendant would be

unable to obtain comparable evidence by other means.

The instant case is unusual in that a prosecution would never have ensued against petitioner had not petitioner severely beaten John J. Sweet and caused Sweet to panic and seek the aid of law enforcement officials in Massachusetts and Florida. The State had preserved all items of evidence for more than nine and one half years subsequent to Maxcy's murder, including approximately 5 years after Sweet had been discharged. At the time the items were destroyed, there was no active prosecution or investigation nor was it forseeable that the master-mind of the murder would step forward after 15 years due to his fear of petitioner. Confronted with these unusual facts, the Florida Supreme Court applied the proper standard in assessing petitioner's destruction of evidence claim.

POINT II

THE ADMISSION OF THIRD PARTY TESTIMONY TO REBUT AN EXPRESS OR IMPLIED CHARGE OF RECENT FABRICATION OR IMPROPER MOTIVE DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND CONFRONTATION.

Petitioner's second point involves the use by the State of a witness to rehabilitate the State's chief witness, John J. Sweet. It has never been contended that during defense counsel's vigorous cross-examination of Sweet an express or implied charge of recent fabrication or improper motive was raised. Therefore, to rehabilitate Sweet, the State presented the testimony of Abe Namia, a private investigator who was hired by John Sweet's attorney after Sweet was charged with the murder of Charles Von Maxcy. Your respondent has set forth the testimony of Sweet and Namia in our

Statement of the Case, supra, and, therefore, for the sake of brevity, requests this Honorable Court to refer to that Statement of the Case. A review of that testimony reveals that the trial court did not abuse its discretion by permitting the testimony of Abe Namia.

Petitioner's primary concern with the admission of Namia's testimony hinges upon the fact that Sweet denied ever making any statements to Namia. Thus, petitioner reasons, testimony should not be admitted as prior consistent statements where the declarant denies ever making the statements. However, this claim that there must be a foundation by eliciting the declarant's testimony that he made prior consistent statements is unsupported by any authority. The Florida Supreme Court correctly ruled that Namia's statements were sufficiently consistent

with Sweet's testimony to be admissible to rebut an inference of recent fabrication or improper motive. In United States v. DeVore, 423 F.2d 1069 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971), the trial court had excluded rehabilitative testimony relating to a specific incident because the witness being rehabilitated had not testified to the same incident. The Fourth Circuit found that the testimony was admissible as a prior consistent statement designed to corroborate the witness's entire story.3/ Similarly, in the instant case, the Florida Supreme Court has correctly ruled that Namia's testimony was admissible as a prior consistent statement

3/ However, because the court could not say that the trial judge's ruling constituted an abuse of discretion, the judgment was affirmed.

designed to corroborate the witness's entire story. Indeed, a comparison of the testimony of Sweet and Namia reveals that the two stories were substantially consistent so as to render Namia's rehabilitative testimony admissible. Here, Sweet was vigorously cross-examined to such an extent that the introduction of Namia's testimony was necessary to rehabilitate Sweet. No right of confrontation was abridged where Sweet and Namia were available for, and indeed subjected to, vigorous cross-examination. This Honorable Court should decline to exercise its certiorari jurisdiction where the Florida Supreme Court properly ruled that the trial court did not abuse its discretion in permitting prior consistent statements admitted to rebut an express or implied charge of recent fabrication or improper motive.

POINT III

THE DEATH PENALTY RECEIVED BY PETITIONER WAS IMPOSED IN ACCORDANCE WITH CONSTITUTIONALLY PERMISSIBLE STANDARDS.

Petitioner also seeks certiorari based upon his assertion that the death penalty imposed in the instant case constitutes cruel and unusual punishment. His claims, however, have either been affirmatively rejected by state and federal courts or have not even been properly presented so as to enable this Honorable Court to exercise its certiorari jurisdiction.

Petitioner claims that he has properly asserted a claim that the Florida death penalty statute is unconstitutional because the death penalty is imposed unevenly on the basis of the race of the victim. He notes that this Honorable

Court has accepted jurisdiction in a Florida case, Hitchcock v. Wainwright, No. 85-6756, cert. granted, 54 U.S.L.W. 3809 (Supreme Court June 9, 1986). Hitchcock is simply inapposite to the instant case. The Hitchcock issue concerns the necessity for an evidentiary hearing in a federal court as to the race of the victim, i.e., whether statistical evidence supports the assertion that the Florida death penalty is imposed unevenly on the basis of the race of the victim. In the instant case, petitioner has never requested a hearing on this issue nor has he deemed this issue significant to the extent of presenting any motion to the state courts on this ground. Rather, petitioner submitted a short, conclusory allegation in his brief before the Florida Supreme Court. The record of the instant case reveals that no motion was either filed or argued before

the trial court concerning this claim. Thus, the issue has not even been preserved and, therefore, is not in the same posture as Hitchcock. This Honorable Court should decline to exercise its certiorari jurisdiction where a petitioner has failed to present this claim in the proper fashion to the state courts for resolutiuon.

Also, this Honorable Court has rejected the claim that Florida unconstitutionally applies the death penalty more often when the victim is white than when the victim is black. See, Sullivan v. Wainwright, 464 U.S. 109 (1983); Booker v. Wainwright, 764 F.2d 1371 (11th Cir. 1985), cert. denied, 106 S.Ct. 339 (1985).

Petitioner also complains that the Florida death penalty statute provides for arbitrary and capricious imposition of the

death penalty. In particular, petitioner complains that two of the three aggravating circumstances found by the trial court were essentially the same. He argues that a murder committed for pecuniary gain and a murder committed in a cold, calculated manner without any pretense of moral or legal justification are essentially the same conduct and cannot be used separately to aggravate a murder. This contention is simply without foundation. In the instant case, the trial judge found the aggravating circumstances of pecuniary gain where petitioner was hired and paid to commit a murder. The trial judge further found that the murder was cold, calculated and premeditated based on evidence that the murder was dispassionately conceived and planned. Thus, <u>different aspects</u> of the murder were considered and there was no

improper doubling of aggravating circumstances. See, Squires v. State, 450 So.2d 208 (Fla. 1984); Agan v. State, 445 So.2d 326 (Fla. 1983).

In a general allegation, petitioner claims that Florida's statutory scheme is infirm in that it is incapable of avoiding arbitrary and capricious infliction of the death penalty. In support of his proposition, he relies on Godfrey v. Georgia, 446 U.S. 420 (1980). In Godfrey, this Honorable Court determined that because an unconstitutional aggravating circumstance was considered by the Georgia courts, imposition of the death penalty for Godfrey's crimes was unconstitutional. However, Florida's aggravating circumstances have been repeatedly upheld by this Honorable Court. See, e.g., Proffitt v. Wainwright, 428 U.S. 242 (1976). Thus, petitioner has not alleged,

either before this Honorable Court or before the state courts, a basis for the assertion that Florida's death penalty scheme is invalid.

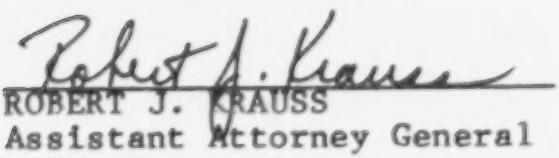
In the instant case, three aggravating circumstances were properly found by the trial court which were balanced against the mitigating finding of the trial court that petitioner is the only person who has received punishment in the Maxcy murder. The imposition of the death penalty in the instant case was done so following established precedent in accordance with the dictates of this Honorable Court. There is no constitutional infirmity present to justify the exercise by this Honorable Court of its certiorari jurisdiction.

CONCLUSION

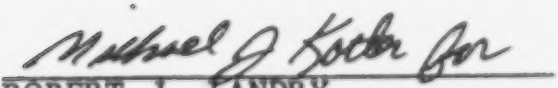
The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



ROBERT J. KRAUSS
Assistant Attorney General



ROBERT J. LANDRY
Assistant Attorney General
1313 Tampa Street, Suite
804, Park Trammell Bldg.
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I, ROBERT J. LANDRY, counsel for respondent, and a member of the Bar of the United States Supreme Court, hereby certify that on the 5th day of August, 1986, I served three copies of the Response in Opposition to Petition for Writ of Certiorari on Allen M. Dershowitz, 232 Brattle Street, Cambridge, MA 02138, by a duly addressed envelope with postage prepaid.

Michael A. Kotler for

ROBERT J. LANDRY
Assistant Attorney General
COUNSEL FOR RESPONDENT

APPENDIX

SUPREME COURT OF FLORIDA

No. 65,134

WILLIAM HAROLD KELLEY, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[April 10, 1986]

ADKINS, J.

William Kelley appeals his conviction for the first-degree murder of Charles V. Maxcy and the death sentence imposed. we have jurisdiction. Art. V, §3(b)(1), Fla. Const.

Appellant's conviction represented the resolution of a highly unusual case, raising some unusual issues. Appellant was indicted in December of 1981 for the Maxcy murder, committed in October of 1966. An explanation of this delay in prosecution requires an examination of the figures involved and the evidence adduced at appellant's trial.

John Sweet, involved in an illicit love affair with Irene, the victim's wife, planned the murder so that he and she could live together on Maxcy's inheritance. Towards this end, Sweet contacted a Walter Bennett in Massachusetts and made the necessary arrangements. A price was set, and in early October of 1966 appellant Kelley and one Von Etter carried out the sinister task.

Because prosecutors found the evidence insufficient to proceed against appellant and Von Etter, and because Irene Maxcy received immunity in return for her testimony in the case, only Sweet was originally tried. His first trial resulted in a mistrial, and the conviction resulting from his second trial was reversed on appeal. Sweet v. State, 235 So.2d 40 (Fla. 2d DCA), cert. denied, 239 So.2d 267 (Fla. 1970).

At that point, the state felt unable to proceed against Sweet due to the lapse of time and the loss of certain witnesses' testimony. Thus, the case lay dormant for over ten years. This standstill was broken only after Sweet, in 1981, became

threatening and approached law enforcement authorities in order to seek some protection by receiving immunity in return for his testimony as to a wide variety of crimes.

it was this testimony upon which appellant's indictment and prosecution in this case were centrally based. Sweet testified as to the details of the planning and execution of the murder, as well as to a purported conversation with appellant several years after the murder in which appellant allegedly said "Boy, [Maxcy] was a powerful guy. I stabbed him three or four times and he kept coming after us, so I had to shoot him in the head." The other central testimonial evidence presented in appellant's trial below was that of one Abe Namia, a private detective originally hired after the murder by Sweet's defense counsel. Namia testified as to some purported statements of Sweet's made in 1967 incriminating appellant. The statements were admitted to rebut an inference of recent fabrication established by the rigorous cross-examination of Sweet as to his extensive immunity and possible motives to fabricate.

Appellant's first trial ended in a mistrial, the jury unable to agree on a verdict. His second trial began in March of 1984. In the verdict presently appealed, the jury found Kelley guilty of first-degree murder and recommended the death penalty. In April 1984, the trial judge filed his written findings of fact in support of the death penalty. He found three statutory aggravating circumstances: prior conviction of a violent felony, section 921.141(5)(b), Florida Statutes (1983); homicide committed for pecuniary gain, section 921.141(5))f); and homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification, section 921.141(5)(i). As a nonstatutory mitigating circumstance he found that appellant was the only participant in the murder to receive punishment.

Appellant raises a number of attacks on the trial of his case and the sentence imposed, alleging a number of prejudicial errors spanning from the time period well before his indictment to the case's conclusion. These contentions will be explored in the order presented.

Appellant first argues that the state's destruction of the real evidence in the case over five years before his indictment deprived him of due process of law and frustrated the preparation of his defense. In addressing this contention, the unusual procedural history resulting in this problem must be considered.

After the reversal of Sweet's second conviction on appeal, he successfully moved for the dismissal of his indictment. At that point, with no active suspects capable of prosecution, the case file, including the evidence involved, was transmitted to the clerk of the court for maintenance. The evidence there remained until April of 1976, nine and a half years after the murder. At that point the state, at the clerk's request, moved for an order requesting the court's permission to dispose of the evidence. The state's motion, indicating that "this cause has been disposed of," was granted and the evidence destroyed. The case subsequently lay dormant until Sweet's testimony against appellant Kelley revitalized the prosecution in 1981.

The destroyed evidence which appellant claims may have had particular exculpatory value was real evidence, principally taken from the scene of the crime -- a bullet, a bloody bedsheet purportedly used to subdue the victim during repeated stabbings, and a shred of the victim's shirt. Also destroyed were two handwritten statements by Sweet, which appellant urges would have been useful in impeachment. Copies of the documentary evidence in the case, by far the bulk of the evidence presented at the earlier Sweet trials, were preserved and used against appellant in the trial below.

Appellant argues that the state's intentional destruction of the evidence of Maxcy's killing over five years before his indictment for a murder committed in 1966 so violated his due process rights that his indictment should have been dismissed.

While recognizing that serious constitutional rights are involved in this question, and that the trial of a capital case in the absence of physical evidence raises grave concerns as to fairness, we cannot agree that in this case appellant's due process rights have been violated.

In resolving the serious problems involved when evidence once in the possession of the state is either lost or suppressed, Florida's courts have built their analyses upon the United States Supreme Court's decisions of Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976). Brady laid down the proposition that "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilty of punishment, irrespective of the good faith or bad faither of the prosecution." 373 U.S. at 87.

The Agurs Court refined the Brady holding by exploring the concept of constitutional "materiality." The bottom line concern in a suppressed evidence case, the Court made clear, is the justice of the finding of guilt. If, upon consideration of the record as a whole, the omitted evidence creates a reasonable doubt not otherwise existing, the evidence is material and constitutional error has been committed. Due process rights are not violated in every case involving the

suppression of evidence. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." 427 U.S. at 109-10.

In State v. Sobel, 363 So.2d 324 (Fla. 1978), this Court utilized that language from Agurs in formulating an analysis applicable to the issue of appropriate sanctions when the state has destroyed evidence. Recognizing that "dismissal of charges against a defendant. . .was an extreme sanction to be utilized with the greatest caution and deliberation," Sobel, 363 So.2d at 327, this Court approved an analysis balancing any negligent or culpable conduct of the prosecutor with any prejudice resulting to the defendant from the destruction of the evidence. Fairness dictated that the burden be placed on the state to prove lack of prejudice to the defendant, if it so contended.

In Salvatore v. State, 366 So.2d 745 (Fla. 1978), cert. denied, 444 U.S. 885 (1979), we reiterated this balancing

standard, implicitly recognizing that each of the same fundamental concern -- that the defendant received a fair trial. The standard of prejudice which must be met by the defendant, we held, varies inversely with the degree to which the conduct of the trial below has violated fundamental notions of fairness. In Salvatore, finding no negligence on the part of the prosecution, we noted that "[i]t should not be presumed that error injuriously affects the substantial rights of the defendant," 366 So.2d at 751, and found that Salvatore's rights had not been violated by the loss of evidence in the case.

Appellant argues that application of the variable standard analysis established in Sobel and Salvatore to the facts of this case mandates a different result. Because the state-ordered destruction of the evidence was at best inexcusable negligence, it is argued, the conduct of the state weighs heavily towards reversal of the decision below. Citng the lack of a statute of limitations for first-degree murder, and appellant's status as a suspect since the commission of the murder

in 1966, appellant urges that the state's destruction of the evidence constituted a breach of its extraordinary duty under these facts.

While we find the destruction of the evidence in this case unfortunate, we cannot read the facts as even hinting at intentional behavior by the state affecting appellant's substantial rights. While extremely hesitant to condone the state's behavior here, we find no negligence in its actions. Obviously, the state had insufficient evidence to proceed against appellant until Sweet offered his testimony in 1981. The destruction of the evidence took place nearly nine and a half years after the state's fruitless efforts to convict Sweet, and five years before appellant's indictment.

In a sense, this is a case of first impression, in which the principles set forth in Brady, Agurs, Sobel and Salvatore are applicable only by analogy. In none of those cases was the lost or destroyed evidence completely unlinked to any active, or even foreseeable, prosecution. On the unusual facts of this case,

therefore, the state's behavior may be excused. We wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different.

In applying the second prong of the analysis, we find that the state has met its burden of establishing lack of prejudice to the appellant's case. Phrased alternatively, we find that appelalnt has failed to establish a sufficient degree of prejudice to justify a reversal of his conviction. Demps v. State, 395 So.2d 501, 504 (Fla.), cert. denied, 454 U.S. 933 (1981).

In resolution of this necessarily speculative analysis, appellate courts have te4nded to defer to the findings of the trial courts on the matter. Sobel, 363 So.2d at 328, Smith v. State, 400 So.2d 956 (Fla. 1981); Krantz v. State, 405 So.2d 211, 212 (Fla. 3d DCA 1981); Budman v. State, 362 So.2d 1022 (Fla. 3d DCA 1978). The trial court below specifically found that the destruction of the particular evidence here in question did not prejudice appellant's case, or

create an otherwise non-existent reasonable doubt. In light of the centrality of testimony rather than real evidence in the case, we cannot disagree. We therefore find the denial of appellant's motion to dismiss the indictment proper.

In his second point on appeal, appellant argues that the trial court erred in permitting a witness to testify as to an alleged conversation he had with John Sweet in 1967. The witness, Abe Namia, was a private investigator hired by Sweet's trial counsel after the murder in 1966. During the conversation, Sweet allegedly made some statements which now incriminate appellant. Namia's testimony was admitted below as testimony of prior consistent statements by Sweet, rebutting an inference of recent fabrication or improper motive established in Sweet's cross-examination.

We reject appellant's contention that Namia's testimony was hearsay and improperly admitted. Defense counsel clearly established an inference of improper motive to fabricate through its extensive cross-examination of Sweet

concerning the laundry list of crimes for which he had been given immunity in return for his testimony against Kelley. Appellant does not deny that the jury was left with an impression of Sweet's improper motive to fabricate, Van Gallon v. State, 50 So.2d 882 (Fla. 1951), but argues that Sweet's statements as reported by Namia were not sufficiently consistent with Sweet's testimony at trial to be properly admissible under section 90.801(2)(b), Florida Statutes (1983).

While keeping in mind that "a failure to properly adhere to the requirement of consistency tends to border on a disregard of the dangers sought to be restrained by the hearsay rule," Sosa v. State, 215 So.2d 736 (Fla. 1968), we find that the two statements concerning the murder varied in only legally insignificant aspects. More troublesome than these minor inconsistencies was the fact that Namia's recollection of Sweet's prior testimony contained certain facts beyond those in Sweet's testimony in chief, which Namia's testimony was admitted to corroborate.

Sweet, according to Namia, had informed Namia that prior to the murder certain unidentified assassins had twice travelled to Florida to kill Maxcy. Although Sweet's testimony in chief did not refer to these shadowy figures, we find that no reversible error was committed in that the additional facts involved were neither highly incriminating nor critical to the establishment of a ultimate fact in dispute. Sosa, 215 So.2d at 745.

In short, appellant was not prejudiced by the admission of the testimony. We have before held, too, that questions concerning the admissibility of extrajudicial statements for the purpose of rehabilitating witnesses impeached by the inference of a recent motive to fabricate are largely addressed to the sound discretion of the trial court, and are not to be reversed in the absence of a prejudicial abuse of discretion. Sosa, 215 So.2d at 744. See also United States v. DeVore, 423 F.2d 1069, 1073 (4th Cir. 1970), cert. denied, 402 U.S. 950 (1971). We find no such abuse of discretion below, and so reject appellant's argument.

Next, appellant argues that the trial court erred in failing to answer a question addressed to it by the jury during its deliberations. After several hours of deliberation, the jury announced that it had reached an impasse. Upon receiving an Allen charge, Allen v. United States, 164 U.S. 492 (1896), the jury resumed its deliberations. The interaction in question occurred when the jury subsequently inquired of the court whether "John J. Sweet received immunity in Florida for first degree murder and perjury before he gave information on the Maxcy trial, and if he had anything to gain by his testimony."

The trial court, while aware that Sweet's testimony on cross-examination established the existence of such immunity, declined to explicitly answer the jury's question concerning the crucial issue since formulating an answer would have required him to both interpret Sweet's testimony and make a judgment as to his motivation.

Rather, the trial court offered to the jury to have Sweet's testimony read back in portions designated by the jury.

We can see no abuse of discretion in such action. The court's insistence upon the jury's rather than its own choice of the passages to be re-read was proper, in light of the latter's legitimate hesitation to comment upon the evidence. The jury question here involved matters of fact, and this Court has held that a trial judge need answer only questions of law raised by jurors. State v. Ratliff, 329 So.2d 285 (Fla. 1976).

In rejecting appellant's contention that the court below acted improperly in this respect, we finally note that Florida law has given the trial court a wide latitude in deciding whether or not to have testimony re-read to jurors upon request. Fla. R. Cr. P. 3.410; DeCastro v. State, 360 So.2d 474 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1365 (Fla. 1979); Simmons v. State, 334 So.2d 265 (Fla. 3d DCA 1976).

In his fourth point on appeal, appellant contends that the trial court erred in allowing the jurors to take notes during the trial and failing to adequately instruct the jury as to the proper role of note-taking. Whether or not a jury is to

be allowed to take notes and use them in the deliberation process is a question within the sound discretion of the trial court. United States v. Rhodes, 631 F.2d 43 (5th Cir. 1980); United States v. Riebold, 557 F.2d 697 (10th Cir.), cert. denied, 434 U.S. 860 (1977).

The jurors were informed by the court that note-taking was optional, and instructed that a juror's note-taking in no way gave him or her authority over the others on the panel. We reject appelalnt's assertion that the jury was inadequately instructed, noting that no additional or different instructions on the matter wre proposed by the defense below.

Next, appellant argues that the trial court erred in admitting certain of his post-arrest statements to FBI agents obtained in violation of his Miranda rights. Miranda v. Arizona, 384 U.S. 436 (1966). Appellant, allegedly in a slightly inebriated condition, was given and examined a Miranda warning form for 15-20 seconds before he returned it, saying "I know my rights." Later in the book-in procedure, appellant learned that

he was wanted in Highlands County, Florida, for murder. After an agent commented to appelant "I'm certainly sure that Highlands County is going to place a detainer on you once they know you have been arrested in Florida," appellant made some statements about Maxcy's murder.

We need not reach in this case the validity of the Miranda warnings as given, and the possible effect of appellant's intoxication, in light of our finding that the agent's statement was not an interrogation within Miranda's purview. The statement, in other words, was not a deliberate attempt to elicit an incriminating response, as prohibited by Rhode Island v. Innis, 446 U.S. 291 (1980). The incriminating statements here in question were therefore volunteered, and neither the letter nor spirit of Miranda has been violated. The statements were therefore properly admitted into evidence.

Appellant next mounts an attack on certain instructions given to the jury in an effort to break a deadlock after it had deliberated for several hours and announced that it had reached an impasse.

The judge gave Florida Standard Jury Instruction 3.06, the authorized jury deadlock instruction, and then proceeded to add some comments of his own. These comments, appellant argues, impermissibly misled and so coerced the jury into returning a verdict that appellant was deprived of his right to a fair trial.

As we have before recognized, the standard jury instructions should be utilized whenever appropriate, State v. Bryan, 290 So.2d 482 (Fla. 1974); Rigot v. Bucci, 245 So.2d 51 (Fla. 1971), for a trial judge walks a fine line indeed upon deciding to depart. Instructions given to a jury at the extremely sensitive point it has reached a deadlock must be carefully scrutinized, Kozakoff v. State, 323 So.2d 28 (Fla. 4th DCA 1975), cert. denied, 336 So.2d 1184 (Fla. 1976), and the risk is too great that an imprudent instruction may lay to waste the conscientious conduct of an otherwise entirely fair trial.

While the standard instructions are therefore to be preferred, the trial court's failure to give them does not determine the issue. A court's straying from the standard instructions, we have

held, does not require automatic reversal. State v. Bryan, 290 So.2d 482 (Fla. 1974). The analysis is not so simple. We must here join the courts which have scrutinized extemporaneous deadlock instructions with an eye towards ensuring that no false duty to decide was suggested, Nelson v. State, 438 So.2d 1060 (Fla. 4th DCA 1983); Lincoln v. State, 364 So.2d 117 (Fla. 1st DCA 1978), that the verdict returned was not coerced, Jenkins v. United States, 380 U.S. 445 (1965), and that the instructions were "balanced," encouraging neither acquittal nor conviction. State v. Bryan, 290 So.2d 482 (Fla. 1974); Gardner v. State, 405 So.2d 470 (Fla. 3d DCA 1981).

At this point it may be helpful to consider the actual instructions which appellant here attacks:

> I would ask that you give it your full consideration. It is an important case.
>
> If you fail to reach a verdict, there is no reason to believe the case can be tried again any better or more exhaustively than it has been.

> There is no reason to believe there is any more evidence or clearer evidence could be produced on either side. And there is no reason to believe the case could be submitted to twelve more intelligent and impartial people than you are.
>
> In the future a jury would be selected in the same manner that you were.
>
> Therefore, I would ask that you retire at this time and consider whether you wish to consider the matter further.
>
> It has tkane us a week to get this far, and I would ask that you retire and consider the case further.

Appellant contends that these instructions so strayed from permissible bounds that they jury was coerced into returning its verdict of guilt, and that the verdict must therefore fall. While reluctant to engage in the speculative analysis of the effect these instructions may have had on the uncertain jury deciding appellant's guilt, we must, and find that caselaw and logic support the appealed conviction.

A fine line must be drawn in such an analysis, but we find that substantially similar instructions have been upheld, United States v. Dixon, 593 F.2d 626 (5th Cir.), cert. denied, 444 U.S. 861 (1979), and that instructions found prejudicial differ in some crucial respects from the instruction given below. Appellant contends, for example, that the result in Nelson v. State, 438 So.2d 1060 (Fla. 4th DCA 1983), should obtain in the instant case. For purposes of comparison, it will be useful to examine the instructions given in that case:

> I don't think that anybody here would be served by you all not arriving at a verdict. It would be wasting your time for whatever period of time which I guess is . . . seven days now. Nobody can repeat this testimony and exhibits placed before you. If you all cannot arrive at a verdict, then something is wrong . . . You just don't understand what happens if we had to retry this case. It is not just reproducing the witnesses . . . but it is going through this whole reppertoire [sic] again for you or for someone else when it is really not necessary. You have herad all the law. That is all the evidence there is. That is it as far as what was presented here before you.

> We look to you for the resolution of this case. It's that pure and simple. . . .
>
> I can't see that it would be impossible when we have just such a fine jury here.

438 So.2d at 1061.

The Fourth District found these instructions coercive in effect. A close examination of the instructions makes clear the prejudicial components which rendered the statement as a whole sufficiently coercive to justify the reversal of a first-degree murder conviction.

First, the instructions subverted the proper role of a jury in a capital trial by implying a false duty to reach a verdict in the case. Lincoln v. State, 364 So.2d 117 (Fla. 1st DCA 1978). Second, the jury was left with the impression that failure to return a verdict would constitute waste, and would put the court to a great deal of trouble upon retrial. United States v. Betancourt, 427 F.2d 851 (5th Cir. 1970).

Because the instructions in Nelson "made it appear that unless a verdict was reached . . . the court's confidence in

the jury's common sense would somehow have been betrayed," 438 So.2d at 1063, the Fourth District found the risk unacceptably high that even a single juror may have been influenced to abandon his conscientious belief as to the correctness of his position.

The instructions given in the instant case presented no similar threat to the integrity of the jury system. Rather than demanding a verdict, the judge below demonstrated an attitude represented by his statement, "I would ask that you retire at this time and consider whether you wish to consider the matter further." We also note that the jury continued to deliberate for a considerable period of time after receiving the instruction, returning to ask the court for an unrelated instruction. In sum, while disapproving of such departure from Florida's Standard Jury Instructions, we can find no prejudice resulting from the instructions as given.

In his seventh point on appeal, appellant argues that he was denied his sixth amendment right to the effective assistance of counsel. Generally, such

claims are not reviewable on direct appeal but are more properly raised in a motion for post-conviction relief. Perri v. State, 441 So.2d 606 (Fla. 1983); State v. Barber, 301 So.2d 7 (Fla. 1974). Unlike those claims raised under the banner of ineffective assistance which we determined should have been raised on direct appeal in Adams . State, 456 So.2d 888 (Fla. 1984), the claims here raised by appellant cannot be sufficiently determined by the record as it stands. The issue is therefore not properly raised here.

Finally, appellant raises a number of arguments attacking the application of the death penalty statute to his case and the statute's constitutionality. Having carefully reviewed each of these contentions, they are found to be without merit. Appellant's conviction and death sentence are therefore affirmed.

It is so ordered.

BOYD, C.J., and EHRLICH and SHAW, JJ., Concur
OVERTON, J., Concurs specially with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., concurring specially.

Because this involves the "triggerman" in a contract killing, the death penalty is appropriate. I am concerned, however, that our system of justice has allowed Sweet, who instigated, planned, and directed this murder, to receive total immunity from prosecution for this murder.

An Appeal from the circuit Court in and for Highlands County,

E. Randolph Bentley, Judge - Case No. CR81-535

Barry Haight, Milton, Massachusetts; and Donald J. Ferguson, Coconut Grove, Florida,

for Appellant

Jim Smith, Attorney General; and Karla J. Staker and Robert J. Krauss, Assistant Attorneys General, Tampa, Florida

for Appellee